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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

Craig for U.S. Senate and Kaye O'Riordan,)	MUR 6128
in her official capacity as treasurer;)	
Larry E. Craig)	

RESPONDENTS' REPLY TO GENERAL COUNSEL'S BRIEF

Respondents Craig for U.S. Senate and Kaye O'Riordan, in her official capacity as treasurer and Senator Larry E. Craig, by their undersigned counsel, hereby reply to the Federal Election Commission's General Counsel's brief. The General Counsel's position, that Senator Craig improperly used campaign funds for legal fees and expenses incurred in connection with an attempt to overturn a misdemeanor conviction relating to his constitutionally-mandated official travel, is supported neither by applicable law nor by the FEC's own Advisory Opinions. Accordingly, there is no basis for the General Counsel's finding that probable cause exists to believe that respondents violated 2 U.S.C. § 439a(b) by converting campaign funds to personal use.

I. RESPONDENTS REQUEST A PROBABLE CAUSE HEARING ON THIS MATTER BEFORE THE COMMISSION

Respondents respectfully request a probable cause hearing on this matter before the Commission, pursuant to 72 Fed. Reg. 64919 (Nov. 19 2007). For the purposes of this proceeding respondents will stipulate that there are no facts in dispute. Both parties generally rely on the same legal guidance. However, in light of the parties' sharply divergent reading of the AOs at issue, as detailed below, respondents believe that the most direct and efficient manner to address this divergence would be in an oral hearing before the Commission. At this hearing, respondents' counsel will address the cited AOs cited and explain why they compel a finding of no probable cause to believe by the Commission.

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II. LEGAL ANALYSIS¹

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The General Counsel's brief asserts that expenditures for legal and public relations services expended to challenge the misdemeanor charge were improperly converted to personal use, in violation of 2 U.S.C. § 493a(b). Section 493a(b) defines "personal use" as the use of campaign funds "to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election or individual duties as a holder of Federal office." 2 U.S.C. § 439a(b)(2) (emphasis added). The FEC's regulations, 11 C.F.R. § 113.1(g)(1)(ii), provide that the FEC "will determine on a case-by-case basis" what expenditures constitute personal use as defined by section 439a(b). The General Counsel's list of FEC Advisory Opinions, at pages eight and nine of its brief, sets forth a number of examples of this case-by-case determination.

It is here, in assessing the guidance provided by the AOs as they relate to the statute, that the FEC's analysis diverges from that of the respondents. Contrary to the General Counsel's conclusion, the AOs make clear that Senator Craig's legal expenses for the Minnesota state court proceedings resulted directly from his official Senate duties and should *not* be deemed personal expenditures. In short, the legal expenses in dispute arose in the course of, and in connection with, his official Senate travel. The FEC has no authority to look beyond that fact and indeed, has declined to do so in previous AOs. Such inquiry in this matter would violate its statutory and regulatory charge and contradict these prior opinions.

It is irrefutable that the charge in Minnesota state court would *not* exist "irrespective" of Senator Craig's duties as a United States Senator. In this regard, the United States Constitution requires that a Senator be "an Inhabitant of that State for which he shall be chosen." U.S. Const., art. I, § 3, cl. 2. The Constitution also provides that Senators "in all Cases, except Treason, Felony and Breach of the Peace, be

¹ For the sole purposes of their reply to the General Counsel's brief, Respondents accept the brief's Statement of the Facts as accurate.

privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same." U.S. Const., art. I, § 6, cl. 1. Accordingly, the Constitution establishes the need for members of Congress to travel between Washington, D.C. and their home states or districts and addresses their rights while doing so.

In this instance, the events giving rise to the charge in Minnesota state court occurred while Senator Craig was traveling from his home state of Idaho to his Senate office in Washington, D.C. Based on the Inhabitation Clause, together with the Immunity from Arrest Clause, Senator Craig's travel was a necessary incident of his status as a U.S. Senator. As such, any obligations or expenses incurred as a result of that official travel, including any legal fees stemming from events that occurred during the trip, would not exist irrespective of Senator Craig's duties as a federal officeholder. Indeed such obligations or expenses should be described as constitutionally-mandated; analysis of this matter should end here.

While there is no legislative or judicial guidance beyond the language in the statute and regulation contradicting respondents' position, their position is also consistent with the relevant AOs issued by the FEC and cited in its brief. For example, page nine of the General Counsel's brief cites AO 2005-11 (Cunningham) where the FEC permitted the use of campaign funds to pay legal fees stemming from a grand jury investigation into fundraising activities and conduct in office. The FEC reached this conclusion because, in its words, "the legal fees and expenses associated with the grand jury investigation would not exist irrespective of Representative Cunningham's campaign or duties as Federal officeholder." AO 2005-11 at 3. The FEC did so despite allegations that Representative Cunningham improperly received benefits wholly unrelated to official duties, including the "sale of his house at an above-market price and a rent-free stay on a yacht." *Id.* at 3.

Similarly, page nine of the General Counsel's brief cites AO 2006-35 (Kolbe) which authorized the use of campaign funds to pay for expenses related to inquiries by the Department of Justice regarding Representative Kolbe's rafting trip to the Grand Canyon with two *former* pages. In authorizing the use of

such funds, the FEC relied both upon Representative Kolbe's assertion that he "took the trip under the auspices of his office" and documents "showing that the trip was part of an official Congressional visit with support provided by the National Park Service and the Office of Public Affairs of the Grand Canyon National Park." AO 2006-35 at 3-4. The AO does not examine whether the underlying allegations about his conduct on the trip related to Representative Kolbe's official House duties nor, apparently, did those allegations affect its decision to approve his use of campaign funds.

Page nine of the General Counsel's brief also cites AO 1997-27 (Boehner) and AO 2000-40 (McDermott), both of which support the conclusion that Senator Craig's expenditure of campaign funds in this matter directly related to his Federal office. In both matters, which addressed legal expenses incurred by parties to litigation concerning unlawful interception and disclosure of a cellular telephone call, the FEC approved expenditures of campaign funds. See 1997-27 at 3 ("activity . . . for which he seeks a judicial remedy . . . resulted directly from the pursuit of his duties as a Federal officeholder") and 2000-40 at 4 ("conduct that is at issue . . . resulted directly from activities that you engaged in because of your position at the time as Ranking Minority Member of the Ethics Committee").

Similar to the Cunningham, Kolbe, Boehner, and McDermott matters, Senator Craig's misdemeanor conviction was "directly related" to his official duties, in this case Senate travel. Were it not for his constitutionally-mandated obligations as a United States Senator, he would not have been in the Minneapolis airport and would not have been subject to the misdemeanor charge. That the alleged conduct underlying the disturbing the peace charge was not strictly performance-related is of no consequence. Certainly, the Department of Justice's investigation into Representative Kolbe's conduct on an official trip went beyond his official House duties. Similarly, the allegations at issue in the lawsuit *Boehner v. McDermott* – that Representative McDermott improperly provided copies of an illegally taped telephone call to members of the media – transcended the general parameters of both members' House duties. Nor did the allegations of improper free lodging or a fraudulent home sale in Cunningham

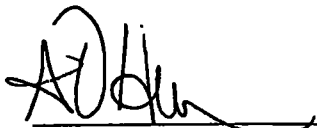
implicate official duties. Instead, in all four AOs discussed above, the FEC held that it was sufficient that the general behavior at issue arose from official duties and concluded that it need not look beyond that test to determine that the expenditures were legitimate.

The General Counsel's brief makes no attempt to, nor can it, analogize this matter with the circumstances for which an expenditure of campaign funds would be improper. Unlike personal matters, such as the payment of veterans' benefits, Senator Craig's arrest occurred while he was performing one of his constitutionally-mandated duties as a Federal officeholder. Senate rules authorized Senator Craig to charge the cost of his transportation, his meals, and any other related expenses while traveling. If there had been a fee for the use of the restroom, that too would have been chargeable to the United States Senate. See 152 Cong. Rec. S11403, S11473 (Dec. 7, 2006) ("Per diem expenses include all charges for meals, lodging, personal use of room during daytime, baths") (United States Senate Travel Regulations for 109th Congress, Second Session).

III. CONCLUSION

The General Counsel's brief's assertion that there is probable cause to believe that respondents violated 2 U.S.C. § 439a(b) is not supported by the law or the facts. Contrary to the brief's conclusion, the relevant FEC AOs support respondents' position that Senator Craig's use of campaign funds to pay his legal and public relations expenses were directly connected to his constitutional obligations as a United States senator and, therefore, authorized by statute. Accordingly, the Commission should determine that no probable cause to believe exists.

Respectfully submitted this 25th day of April, 2011.



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